IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TIM CALLAHAN d/b/a TIM'S SUNOCO, et al.	:	CIVIL ACTION
v.	:	
SUNOCO, INC., et al.	:	NO. 03-4461

MEMORANDUM

Dalzell, J. May 19, 2004

Several individuals and business entities that have leased service stations from Sunoco, Inc. and Sunoco, Inc. (R&M) (together, "Sunoco") bring this diversity action against Sunoco for breach of contract. Plaintiffs' motion for class certification is now before us.[1]

Factual Background

Sunoco distributes and markets gasoline in twenty states and in the District of Columbia through three kinds of service stations. First, it transports gasoline to its company-operated stations ("co-ops"). Second, Sunoco sells gasoline to distributors ("jobbers") at the "rack" price then in effect at the terminal[2] where the jobber takes delivery of the gasoline. From the terminal, jobbers transport the

[1] The parties' extensive briefing is predicated on the discovery we afforded by Order of Oct. 15, 2003, which was no less than four times extended at the parties' request.

[2] Sunoco maintains 102 terminals from which jobbers may take delivery of gasoline, and it sets the rack price at 88 of these terminals on a "daily basis." Schwab Aff. ¶ 9. There is no posted rack price at the other 14 terminals. Id. ¶ 6.

gasoline to their own stations, where they resell it to the public.

Finally, Sunoco enters into Dealer Franchise Agreements (DFAs) with individuals and entities like the plaintiffs ("dealers"). Among other things, a typical DFA will include a lease of a Sunoco-owned service station to a dealer and a provision obligating Sunoco to provide gasoline to the station at the "dealer price in effect."[3] Every business day,[4] Sunoco's Pricing Department sets the DTW price for each of the 448 price zones in which the 1,271 dealers operate.[5]

Because the DFAs include an open price term for the gasoline that Sunoco supplies, Sunoco must -- at least in jurisdictions that have adopted the Uniform Commercial Code -- set a DTW price in "good faith," with "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." See generally U.C.C. §§ 2-103(1)(b),

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[3] The parties commonly refer to this price as the "dealer tank wagon" price or "DTW" price.

[4] During a lengthy discussion of how Sunoco sets its DTW prices, the Pricing Department manager testified that he is "involved every day in pricing decisions" and that he reviews his employees' recommendations "at the end of the day before we finalize the decision." See Schwab Dep. at 55.

[5] Although we rely on Sunoco's figures, see Schwab Aff. ¶¶ 5, 7, we note that Sunoco provided plaintiffs with information about only 778 dealers operating in 329 price zones, see Leffler Decl. ¶ 12.

2-305(2) (1998). Plaintiffs contend that Sunoco has breached their DFAs because it has not set the DTW price in good faith. Specifically, they allege Sunoco has set the DTW price with "an apparent goal of . . . eliminat[ing] Dealers . . . from their marketing operations throughout the United States, so as to take over and operate, or eliminate the Dealers' service stations." Compl. ¶ 20.

Although plaintiffs initially attempted to bring suit on behalf of all dealers who purchased Sunoco-branded gasoline pursuant to an open-price term during the period from August 1, 1999 through the present, see Compl. ¶ 22, they now "seek to certify a class . . . consisting of the 249 Franchise Dealers" identified in Dr. Keith B. Leffler's Declaration.[6] Pls.' Mem. Supp. Class Cert. at 2 & Ex. 6. Dr.

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[6] In their reply brief, plaintiffs have proposed a third definition for the class. This definition includes dealers who purchased Sunoco gasoline at the DTW price while it "exceeded the prevailing competitive price." See Pls.' Reply at 3. Identifying members of this third proposed class would be extremely time-consuming because the Court would have to define a methodology for computing the "prevailing competitive price." Because that price would change daily and would vary from dealer to dealer, we would have to compute the prevailing competitive price more than one thousand times for each of Sunoco's more than one thousand dealers. Our task would not end there, however, because we would next have to compare each of these hundreds of thousands of "prevailing competitive prices" with the DTW price charged to the relevant dealer on the relevant date. In short, the third proposed "definition" of the plaintiff's class is more of an invitation to undertake additional discovery than a precise identification of the members of a class. Thus, we shall concentrate on whether to certify the 249-dealer class and not discuss plaintiffs' underdeveloped "fallback" positions. Cf. Forman v. Data Transfer, Inc., 164 (continued...)

Leffler selected these 249 dealers because they operated in the 77 price zones where (1) the average DTW price was more than 0.5 cents higher than the average benchmark price[7]; and (2) dealers' competitors supply more than fifty percent of the gasoline. We turn now to the merits of plaintiffs' motion to certify this 249-dealer class.

Analysis

Before deciding whether plaintiffs come within one of the provisions of Rule 23(b), we must consider whether they have satisfied the prerequisites listed in Rule 23(a). Georgine v. Amchem Prods., Inc., 83 F.3d 610, 624 (3d Cir. 1996), aff'd sub nom. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). The four prerequisites to a class action are:

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[6](...continued)
F.R.D. 400, 403 (E.D. Pa. 1995) (Giles, J.) ("[P]laintiff must 'define the class in a way that enables the court to determine whether a particular individual is a class member.'").

Sunoco argues that even the definition of the 249-dealer class is too "subjective and arbitrary" to permit certification because Dr. Leffler's methodology is flawed. See Defs.' Mem. Opp'n Class Cert. at 19-27. Because we deal here only with the certification question, we defer resolution of the merits of Dr. Leffler's methodology until another day. Even if that methodology is flawed, plaintiffs now request only that we certify a class of 249-dealers. How they identified the members of the proposed class is not directly relevant to whether they have met the requirements of Rule 23.

[7] The benchmark price is the rack price plus 4 cents per gallon. The 4-cent addition is a "conservative" estimate of what it would cost to transport the gasoline from a terminal to a dealer. See Leffler Decl. ¶ 10.

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a) (2004). As a shorthand, courts regularly refer to the prerequisites as numerosity, commonality, typicality, and adequacy of representation. See Amchem, 83 F.3d at 624. Because Sunoco does not challenge that a 249-member class is so numerous as to make joinder impracticable, see Defs.' Mem. Opp'n Class Cert. at 28-29, we conclude that plaintiffs have satisfied the numerosity requirement and shall proceed to the other prerequisites to class certification.

A. Commonality

The commonality threshold is relatively low because the named plaintiffs need only "share at least one question of fact or law with the grievances of the prospective class." Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994). While plaintiffs claim that this case raises the common question of whether Sunoco's DTW pricing procedures breached its contractual obligation to set those prices in good faith,[8]

[8] Apart from issues related to Sunoco's liability for bad faith pricing decisions, plaintiffs suggest that there are common questions about whether those decisions (continued...)

Sunoco insists that plaintiffs have not demonstrated commonality.

Sunoco points out that Texas has developed an inquiry into whether a merchant acted in "good faith," within the meaning of U.C.C. § 2-103(1)(b), that differs from the approach that other states, including Ohio, use. Compare Tom-Lin Enters., Inc. v. Sunoco, Inc., 349 F.3d 277 (6th Cir. 2003) (interpreting Ohio law) with Mathis v. Exxon Corp., 302 F.3d 448 (5th Cir. 2002) (construing Texas law). The differences that Sunoco cites, however, are not relevant to this case because none of the members of the proposed class do business in Texas. To be sure, there may be state-to-state variation about how to evaluate a merchant's good faith in the states where Sunoco dealers do operate, but the parties' briefs have not yet persuaded us that such variations are significant enough to preclude a finding of commonality.

Sunoco also suggests that it could not have set DTW prices in bad faith out of a desire to take over plaintiffs' businesses because divorcement laws in several of those states prohibit it from operating service stations. See,

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[8](...continued)
caused damage and, if any, the extent of those damages. See Pls.' Mem. Supp. Mot. Class Cert. at 11. Even if an economic methodology, such as the one that Dr. Leffler devised, could resolve common questions of damages, we shall not certify a class when there are no common liability questions merely because there may be common damages questions.

e.g., Conn. Gen. Stat. § 14-344a (2003). While divorcement laws cast doubt on whether Sunoco hoped to take over the plaintiffs' stations in certain states, they do not resolve the question of whether Sunoco set DTW prices in bad faith in those states. It is possible -- and not inconsistent with the complaint -- that Sunoco acted in bad faith to extract as much money as possible from dealers, hoping to take over stations only where the law would not prohibit it.

In another attempt to avoid a finding of commonality, Sunoco alleges that two of the named plaintiffs (and many other members of the proposed class) have released it from any claims arising out of their DFAs. This defense, if established, could prevent dealers from recovering damages, even if Sunoco acted in bad faith. The existence of a possible affirmative defense, however, does not negate the common question about whether Sunoco would have been liable but for that defense. Moreover, if Sunoco established its defense, we could amend a certification order to exclude class members who waived their rights to recover for breaches of the DFAs. See Fed. R. Civ. P. 23(c)(1)(C).

Finally, Sunoco argues that there are no common questions because it made each of its thousands of DTW pricing decisions independently of all of the other decisions. Sunoco concludes, therefore, that plaintiffs must show that it acted in bad faith when it made each DTW pricing decision that they claim breached a DFA. In other words,

Sunoco maintains that plaintiffs share no common questions of fact because each plaintiff's claims depend on separate inquiries into Sunoco's good faith.

Plaintiffs contend that Sunoco's argument is not appropriate at this stage of the litigation because it goes to the "merits" of the case, but they seem to misunderstand the argument. We agree that the issue of whether Sunoco actually acted in bad faith must await another day, but we cannot put off the question of whether to analyze Sunoco's pricing decisions individually or collectively.

Plaintiffs also argue that Dr. "Leffler has developed the proper method for addressing" the complex issues of whether Sunoco made its pricing decisions in bad faith. See Pls.' Reply at 20-21. We disagree. Dr. Leffler has developed a methodology for identifying dealers who have incurred the largest damages, assuming that Sunoco set DTW prices in bad faith. Indeed, Dr. Leffler admits that he was asked only "to examine . . . how Sunoco dealers are impacted" by Sunoco's pricing practices. Leffler Decl. ¶ 4. No matter how persuasive we may regard Dr. Leffler's damages analysis, it simply offers no insight into whether Sunoco acted in bad faith, the central liability issue in this case.

Plaintiffs might have claimed that Sunoco's individual pricing decisions were motivated by a common cause, such as a desire to drive the dealers out of business, and that this common motive tainted each of the individual

pricing decisions. For this argument to succeed, however, plaintiffs would have had to come forward with some evidence that Sunoco harbored such impure motives. Plaintiffs do point to the testimony of two dealers who said that it "seem[ed]" like Sunoco was trying to put them out of business, see Pls.' Reply at 13-14 & n.10, but such uncorroborated statements cannot support a finding that there is indeed a common question of whether Sunoco's individual pricing decisions were motivated by a common aim.

Although the complaint appears to raise the common question of whether Sunoco made DTW pricing decisions in bad faith, Sunoco has shown that it made separate pricing decisions for each price zone after considering the zone's local competitive conditions, historical sales volumes, market trends, and other factors. See Schwab Dep. at 18-49. Even after setting a DTW price for each zone, Sunoco reconsidered its decision every day as it received updated data. See Schwab Dep. at 55. Because plaintiffs have not come forward with any evidence that all of these thousands of individual pricing decisions were part of a common plan, we cannot find that there are questions of law or fact common to the class.

Having failed to show commonality, plaintiffs' motion for class certification must fail. Nevertheless, we shall consider the other prerequisites to a class action to round out the record. See Fed. R. Civ. P. 23(f).

B. Typicality

Typicality requires "the court to assess whether the class representatives themselves present those common issues of law and fact that justify class treatment, thereby tending to assure that the absent class members will be adequately represented." Eisenberg v. Gagnon, 766 F.2d 770, 786 (3d Cir. 1985). Though eight of the twelve named plaintiffs are no longer part of the proposed class, the claims of the other four named plaintiffs[9] "have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." Baby Neal, 43 F.3d at 57. Still, the same concerns that we raised in our discussion of commonality demonstrate that "this class is a hodgepodge of factually . . . different plaintiffs" of which "no set of representatives [could] be 'typical.'" Amchem, 83 F.3d at 632.

C. Adequacy of Representation

The final prerequisite to class certification is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4) (2004). To assess this factor, our Court of Appeals

[9] The four named plaintiffs remaining among the proposed 249-member class are: Chima & Bains, Ltd.; Michael Kopty d/b/a Michael Sunoco; West Seneca One Stop, Inc.; and S.N. Enterprises of WNY, Inc. Defs.' Mem. Opp'n Class Cert. at 37.

has explained that we should inquire into whether (1) the named plaintiffs have conflicts of interest with other members of the proposed class; and (2) counsel is qualified to represent that entire class. See Amchem, 83 F.3d at 630. Sunoco asserts that eight of the named plaintiffs have conflicts with class members because they are not part of the proposed class, but this point is not particularly relevant because the other four named plaintiffs have no conflicts of interest.[10] Similarly, Sunoco's criticism of plaintiffs' counsel appears unfounded in view of counsel's affidavit. Thus, we find that four of the named plaintiffs will fairly and adequately protect the interests of the class.

Conclusion

Although plaintiffs have shown numerosity and adequacy of representation, they have failed to establish commonality and typicality. We shall, therefore, deny their motion to certify a class consisting of the 249 dealers that Dr. Leffler identified.

An appropriate Order follows.

[10] Despite Sunoco's suggestion that two of the remaining four plaintiffs have conflicts because they released Sunoco from any claims arising out of the DFAs, the releases do not create conflicts of interest. They may weaken the claims of the alleged releasors relative to the claims of the non-releasing dealers, but this difference does not make their claims adverse to each other.

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ORDER

AND NOW, this 19th day of May, 2004, upon consideration of plaintiffs' motion for class certification (docket entry # 18), defendants' response thereto, plaintiffs' reply, and defendants' surreply, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. Plaintiffs' motion for class certification is DENIED; and

2. The parties shall APPEAR in our Chambers on May 26, 2004 at 4:30 p.m. for a pretrial conference.

BY THE COURT:

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Stewart Dalzell, J.